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ABSTRACT

Part of a continuing series on freedom of information issues, this report reviews the handling of the papers of presidents of the United States after they have left office and alludes briefly to access to papers of other public officials. It specifically discusses the issue of access to the records of President Richard Nixon and discusses some of the court cases and pieces of legislation that have come about in relation to those papers. It also includes a discussion of presidential libraries. (TJ)

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FREEDOM OF INFORMATION CENTER REPORT NO. 411

ACCESS TO FEDERAL OFFICIALS' PAPERS

This report was written by Robert Schwaller, an M.A. candidate at the University of Missouri School of Journalism. This is the last in a series of reports on access to information from federal officials.

At one time during President Hoover's administration, White House officials couldn't find (**Christian Science Monitor**, 8-20-74) an original copy of the Versailles Treaty ending World War I. They looked for a year before turning in desperation to Woodrow Wilson's widow, who had to dig one out of her attic.

When Margaret Truman Daniel published a book on her father, historians were outraged that Truman had allowed her access to presidential papers that were closed to outside researchers. Indeed, Truman was said to have assumed an almost autocratic attitude to his presidential records. According to Neil Sheehan (**New York Times**, 6-13-70),

> He has refused access not only to independent scholars but also to the chief State Department historian, who wanted to check the completeness of State Department publications of diplomatic documents against Mr. Truman's records.

Archival horror stories abound: Henry Kissinger's phone call journals; former House Speaker Carl Albert beating congressional Koreagate investigators to his papers — he needed to extract what a source described (Washington **Post**, 1-1-77) as sensitive papers dealing with his trips to Korea before the investigating House committee could get them; and lastly, the burning of former Supreme Court Justice Hugo Black's bench notes, as his will required (Washington **Star**, 4-11-77).

These are the nightmares that cause archivists and historians to toss and turn in their sleep. Presidents before Nixon had complete possession and control of their personal and official papers and other materials. Most saw to it that limited access was provided during their lifetime, and most deeded the whole of their papers to the government upon their death. But the access has remained by their sufferance, and the tradition has been shaky. Furthermore, it has been axiomatic that the material researchers and reporters most want is the material that former presidents most want hidden, at least until they or their contemporaries on the political stage have passed into history.

The situation worsens in the cases of lesser federal officials, congressmen and federal judges. Federal records — those that record the official business of the department, agency, office or court — stay with the position. But files for the individual, kept for his or her convenience in conducting the day-to-day activities of the job, are often carted off or unceremoniously destroyed when the individual leaves office. Because the lesser offices are not in the public spotlight, and because they lack the monarchial trappings of the presidency, the officeholders have neither the incentive nor feel the noblesse oblige to bequeath their files to the public.

In discussing the documents of federal officials, it is helpful to establish three types of papers, based on a classification used by the National Study Commission on Records and Documents of Federal Officials.[1]

- **Personal papers** are those "which are of purely private or non-official character." Examples are diaries, family records and correspondence not involving official duties. There seems to be no question that these are personal property.
- At the opposite end of the spectrum are the **federal records**, the official documents of the "organization, functions, policies, decisions, procedures, operations or other activities of the government." These materials, of course, stay with the office.
- In the gray area between the two are what the commission calls **public papers**,

> confidential communications between an official and his staff, working papers reflecting the decision-making process, conference notes; and various other materials found in presidential papers, the office files of members of Congress, and the chamber files of judges.

This does not mean that public papers are public property. Most officials would prefer to call them personal papers or office files, although they are created with government personnel on government time, using government resources.

But it is the ownership and handling of public papers that are at the center of the present controversy.

The commission recommended in March 1977, that federal records be governed by the Freedom of Information Act and that public papers of the president, vice president, congressmen, and federal judges be declared public property and deposited with the National Archives and Records Service when the individual leaves office. The papers

Summary: The Nixon papers, although still not available to public access, served as a catalyst to legislation ensuring the preservation of presidential and other federal officials' papers. The author reviews the Nixon battle, summarizes arguments for and against access and looks at past and present methods of disclosure.

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would be available for public access with restrictions up to 15 years. Other exemptions from access are for national security, privacy, etc.[2] A 1978 law adopted a small part of the recommendations regarding the presidential and vice presidential papers. President Nixon is still fighting the provisions of a 1974 law impounding his papers for eventual public access.

Pros and Cons of Access

A person interested in the ideal disclosure and access regulations for public papers of former officials would probably construct a very large building in the nation's capital. In it would be a host of archivists working non-stop to index, catalog and then open to the public the records of each public servant of any importance, the president on down. Each public servant would obediently deliver the papers on his way home from the office on the last day of his tenure. Of course, there are logistic, as well as more weighty, problems with such a system, but for a moment, consider the advantages.

James B. Rhoads, archivist of the United States, believes (Louisville **Courier-Journal**, 10-15-78) that

> it is probably safe to say that there are no bodies of papers in modern America that have more value, more research potential, that are a greater documentary treasure to this country than the presidential papers.

Rhoads points out that among presidential document collections are records not only of the administration but also of the national culture during that administration. Literature, legislation, policy decisions and personalities are all parts of the executive record, and the best presidential libraries weave the elements together, forming a "living memory" of the nation and bringing the presidency to the people in a way that press conferences and state of the union addresses cannot.

Adequate archival treatment of government records guarantees continuity from one administration to the next, and on the lower level, from one official to his successor. A favorite archivist's anecdote describes (New York **Times**, 2-1-75) President Kennedy's having to send a personal envoy to Gettysburg to obtain from Eisenhower correspondence the former chief executive had had with Harold McMillan, Britain's prime minister. McMillan, whose tenure spanned the 1960 U.S. election, had mentioned an agreement with Eisenhower regarding the sharing of nuclear technology, which Kennedy had no record of.

During Nixon's administration, negotiators in SALT talks found (New York **Times**, 2-1-75) that the White House lacked copies of previous conversations with Soviet officials regarding disarmaments. Consistent, thorough archives could prevent such embarrassments.

The practices of Truman mentioned earlier are typical of the capriciousness of present access regulations imposed by each chief executive. Historian Arthur Schlesinger has discussed laxity of access regulations when the researcher has inside connections, and mentions[3]

> The proliferation of memoirs in which former presidents, diplomats and even special assistants to presidents break the official deadline (for removal of restrictions) with impunity . . .

Those more cynical will look at egalitarian access for former officials' files as a deterrent to self-serving memoirs. "The clever diplomat, telling different things to each side in negotiation, would like to tell a fresh and entirely exonerating tale in his memoirs," Gary Wills writes (Washington **Star**, 3-2-78). "But certain embarrassing papers stand in the way . . ."

A more telling argument for liberal access is that the present system works only when the official, who is not obligated to donate his papers, wants it to work. To use Rep. Richard Pryor's term, a "rogue" president may not want (Des Moines **Register**, 3-1-78) to follow the traditions of his predecessors.

A comprehensive, formal archival system for former officials' papers would solve these problems, but this type of access has its drawbacks, too. As with all government records, the immediate, unbridled access would tend to chill the willingness of advisors to advise and holders of privileged information to confide to a president's ear. Further, the knowledge that records would be open to the public might stimulate officials not to commit themselves on record. Herman Kahn, of the Presidential Libraries System, said in 1972[4]

> My own conviction is that there has been a decline in the qualities of frankness and honesty in our records to a considerable degree because of the great pressure to make everything immediately available to historians and journalists who want to do historical writing about what happened yesterday, last month or last year.

Concern has been expressed at the idea of an administration moving in on the records of its predecessors of the opposing party, able to load itself with political ammunition from the informal or confidential musings of past staff members. As in all access questions, the balance must be struck between the need for secrecy and the need to know.

Presidential and Vice Presidential Papers — Then and Now

The history of presidential papers could be divided roughly into three stages, each increasing in complexity as the executive office and the volume of documents grow. The first stage was simply a lack of any plan for preservation of the papers. Washington took his papers with him; if he hadn't they probably would have been discarded. White House papers of William Henry Harrison, John Tyler and Andrew Jackson were destroyed or partially lost in fires. Harding's widow deliberately destroyed most of the documents of her husband's scandal-ridden administration. Lincoln's heirs kept his papers until 1923, when they were turned over to the government on the condition that they would be closed to research until 1947[5]

The second stage began in the early 1900s, when the government began to gather the scattered remains of the collections and store them in the Library of Congress. "By gift or purchase the Library of Congress has the papers of 23 former presidents," wrote Don McLeod of **Stars and Stripes**. Because of accident, inattention or design, "none of the 23 are complete and some were heavily depleted while in private hands."[6]

The latest stage is the presidential library. Franklin Roosevelt formalized the concept when he established a presidential library at Hyde Park, New York, in 1940. In 1955 Congress passed the Presidential Libraries Act that authorized the National Archives and Records Service to accept presidential papers and title to facilities that would serve as depositories for the documents. For the year 1977 the National Archives, a part of the General Services Administration, operated (Louisville **Courier-Journal**, 10-15-78) six libraries at a cost of $6 million. Each chief executive since Roosevelt has planned to place his papers in a library, traditionally in the president's home state. With the exception of Nixon's papers, which are impounded by the government pending resolution of suits challenging the former president's access requirements, and

Carter, for whom plans are being made, all the presidents since 1933 have a library. (See sidebar.)

The bulk of documents in the executive office of the president are public papers. These include:

- White House central files — incoming correspondence from heads of state, departments and agencies, Congress, and citizens.
- Special files — files in which the incumbent has the greatest interest or which are especially sensitive, such as investigative reports, information on the Korean War (Truman), and correspondence with the secretary of state (Eisenhower).
- Staff files — papers maintained by White House aides, assistants and advisors. This material sometimes includes the files of advisory groups in the Executive Office. Other advisory groups, such as the Council of Economic Advisors and the National Security Council, keep their records apart from the president's papers and treat them as federal records, to continue in the offices over administrative changes.

According to the Documents Commission, vice presidential papers are handled in the same manner as presidential papers. The commission reported that they often end up in the same depository as the president under which the vice president served, in the presidential library if the second-in-command ascended to the chief executive position, or in various non-federal archival institutions.

Federal Agencies

Although the federal records of agencies are governed by the provisions of FOIA, the public papers are still in that fuzzy area between personal records and official files. According to the Documents Commission report, the Code of Federal Regulations provides that "preliminary worksheets" and similar papers that need not be made a matter of record are "non-record material." More recently the Archivist of the United States issued a bulletin on the disposition of personal papers and official records to all heads of federal agencies, attempting to tighten the distinction between personal papers and official records. As quoted in the commission report, the bulletin noted that[7]

> . . . correspondence designated "personal," "confidential" or "private," etc., but relevant to the conduct of public business is nonetheless an official record subject to the provisions of federal law pertinent to the maintenance and disposal of such records.

The Office of Management and Budget issued a memorandum in July 1975, which excluded from the Privacy Act's category of agency records "uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion."

In the presence of such contradictory guidelines, the commission reports, "a number of agencies have developed guidelines to clarify for their own officials the parameters of record material."[8]

The biggest controversy in this area is the disposition of Kissinger's journals of his phone conversations while he was secretary of state, and before that, as security advisor to Nixon. Kissinger had had his calls monitored by personal secretaries and made transcripts of the conversations. He announced (Milwaukee **Journal**, 12-29-76) that his official papers would go to the Library of Congress with the requirement that they be restricted for 25 years or until five years after his death. He did not include his phone transcripts in the donation.

The issue that immediately arose was whether the papers and transcripts were already public property. If so, they were not Kissinger's to give, and he could put no restrictions on their access. After objections were voiced, Kissinger decided (New York **Times News Service**, 12-29-76) to include the transcripts with the additional restriction that after the original requirement of 25 years or five years after his death, any person living who is mentioned in the transcripts could withhold permission for publication of any conversation he or she had had with Kissinger until after the person's death.[9]

The Reporters Committee for Freedom of the Press, along with the American Historical Association, the American Political Science Association and a number of individuals, filed (New York **Times News Service**, 12-29-76) suit "on the grounds that the papers and transcripts are public property and restrictions cannot be attached." The plaintiffs filed FOIA requests for information from the transcripts, but Kissinger replied, in line with a ruling from the State Department, that the records are personal working papers and are not agency records within the scope of the FOIA. The National Archives took the opposite viewpoint and asked (Washington **Post**, 2-16-77) Kissinger to alter his stance.

The District Court ruled on Dec. 8, 1977, that[10]

> Although personal in some respects, the records in dispute here were produced not only in accordance with department regulations but also on government time and with the aid of department employees, equipment, materials and other public resources . . . the notes are the property of the United States and should be returned to the State Department.

Kissinger appealed the decision, but on Nov. 7, 1977, the Court of Appeals ruled that the phone transcripts were government property. The records created during Kissinger's time at the State Department should be returned, the court said, and access should be provided or denied under the provisions of the FOIA. The court added that the records from his work as a presidential advisor were not federal records and did not come under FOIA.[11] Kissinger appealed again, and the Supreme Court agreed (Columbia **Missourian**, 4-17-79) to hear the case and determine ownership of the State Department and presidential advisor papers. The high court has scheduled the case for this term.

Congressional Records and Papers

In Congress, the distinction between federal records — committee files, reports, published hearings, bills and resolutions, floor records, administrative actions — and the public papers of individual members is quite clear. Federal records in the House of Representatives are collected by the clerk of the House at the close of each session and transferred to the National Archives. Unpublished records less than 50 years old are available only by permission of the clerk. If the records have been published or are older than 50 years, they are available. Federal records of the Senate, whether stored at the National Archives or elsewhere, are available only by permission of the committee that is responsible for that area of legislation. There is no time period after which records become more available.

Public papers of both senators and representatives are considered by tradition to be the personal property of the member, according to the Documents Commission. The member has complete discretion in the maintenance or dis-

Eyeing The Presidential Libraries — Inside and Out

Although Franklin Roosevelt began the unbroken tradition of presidential libraries, the first library was established in 1916 at the home of Rutherford B. Hayes, in Fremont, Ohio. A library, museum and grave of the 19th president are on 25-acres of land belonging to his heirs. The library is a center for study of the Reconstruction, with letters, diaries, scrapbooks, history books, newspapers, church records, paintings and 50,000 photos from the period.

The Herbert Hoover Library, in West Branch, Iowa, was dedicated in 1962. Built at a cost of $1.4 million, it holds his papers (all of which are declassified) and memorabilia from World War I. Its research facilities were enlarged in the mid-1970s.

The Franklin D. Roosevelt Library, in Hyde Park, N.Y., holds the papers that filled 500 file cabinets after FDR's 12 years in office. Very little of the material remains classified. Among the documents available to scholars are Roosevelt's wartime correspondence with Churchill. The library was established in 1940. In 1972, two Eleanor Roosevelt wings were added.

Visitors to the Harry S Truman Library, Independence, Mo., will see a Thomas Hart Benton mural, "Independence and the Opening of the West," and pens and documents from the Potsdam Conference and the signing of the United Nations Charter. Scholars will find the papers of former Secretary of State Dean Acheson, more than 36,000 books, 44,000 photos and more than 9 million documents. The structure was completed in 1957 at a cost of $1.7 million. The library's namesake kept a strict rein on access to his papers until his death in 1972, when his will deeded them to the government.

The Dwight D. Eisenhower Library, in Abilene, Kansas, was opened in 1962. Constructed with Kansas limestone and imported marble, the library, with a museum and the president's grave, cost $3.1 million. The library holds 15.5 million documents, 68,000 still photos, and audio tapes, films and books. Like the repositories of other presidents' modern papers, the Eisenhower center receives frequent donations of papers and memorabilia from the former chief executive's contemporaries.

One of the most ambitious in concept, the John F. Kennedy Library, on the Boston harbor, was opened in October, 15 years after his death. The structure was originally planned for a site adjacent to Harvard University, but residents feared that traffic problems, fast food chains and souvenir stands might spring up. The nine-story, three-sided museum and archives fits into a glass-and-steel cube almost as tall. Both are connected to a low circular wing that houses two movie theaters. Inside the museum are the famous rocking chair and campaign memorabilia. TV, tapes, montages and murals depict the history of the Kennedy clan. John Kennedy's 8.5 million pages, 115,000 photos and miles of film and tape are available to scholars, except for the material still restricted. The Kennedy Library was built at a cost of $12 million, and will cost the government about $1.8 million to operate in 1980.

The pinnacle of the presidential library era was the opening of the Lyndon Baines Johnson Library in 1971 on the University of Texas campus in Austin. Built at a cost of $18.6 million (provided primarily by the state of Texas), the library houses memorabilia, such as a reproduction of the Oval Office and the wedding dresses of the two Johnson daughters. The 31 million pages of documents are from Johnson's years as a public official. According to a **U.S. News and World Report** (10-22-79), a million pages remain classified, much for the maximum 25-year period.

Plans for a Richard Nixon library faded (Los Angeles **Times**, 2-5-75) when a foundation raising money to build a structure disbanded in the wake of Watergate and the impounding of the Nixon papers. Whittier College, San Clemente and the University of Southern California were considered as locations for a library. The 1974 law that confiscated Nixon's materials requires that they be kept in the Washington, D.C., area indefinitely. Until that statute is amended, the 36 million papers and 5,000 hours of tapes, along with memorabilia from five years of office will remain in a Sunderland, Md., warehouse.

The Gerald R. Ford Library at the University of Michigan and a museum in Grand Rapids mark a trend to more modest presidential landmarks and repositories. Each of the two buildings will cost (Louisville **Courier-Journal**, 10-15-78) about $3.5 million when finished in mid-1980. The library will hold 19 million pages from Ford's public life, plus tapes, photos and other material.

Though not governed by the 1978 Presidential Records Act, Carter has promised to deed his papers to the government. Archivists are now at work in the White House, cataloging the material. The Georgia towns of Plains, Atlanta and Americus (home of Georgia Southwestern College, Carter's alma mater) are vying (Denver **Post**, 4-10-77) to be the site of the collection.

The presidential libraries are constructed with private funds and deeded to the federal government to operate, under the provisions of the 1955 Presidential Libraries Act.

There is concern that the prepetuation of far-flung presidential libraries will wreak havoc on the traveling budgets of presidential scholars. It has been suggested that the papers be retained in Washington, D.C. Others say that the scattering of the facilities has brought the office closer to the people. In 1977 the six libraries were visited by more than two million researchers and tourists.

President Nixon signed an executive order in 1972 that allows citizens to request access to any classified document older than 10 years. When a presidential library receives such a request, they must solicit (Louisville **Courier-Journal**, 10-15-79) opinions from the relevant federal agencies to determine whether the restriction is necessary. If not, the material is declassified.

posal of these files. Often the papers are donated to presidential libraries, state or local historical societies, university libraries and other depositories, where they often are easily accessible.

Problems arise, however, when a member of Congress dies or is defeated unexpectedly. "His records are either destroyed or badly mishandled," said the commission. The commission's greatest criticism of the practice in Congress of handling public papers is that trained archivists rarely are consulted. "As a result, the criteria cited for determining whether specific records should be retained or discarded range from 'poor guesswork' to 'personal judgment' or 'common sense.' "[12]

Records and Papers of the Judiciary

District and appeals courts differ in their handling of federal records from the practices of the Supreme Court. The federal records of the lower courts are required to be kept either at the individual court or in regional archive centers.

The Administrative Office of the United States Courts has statutory responsibility for administrative procedures and guidelines for clerks of the lower courts. Case files must be kept as long as the judgment of the court is subject to attack. Dockets and minutes of court schedules and proceedings must be retained permanently.

However, the administrative office's function on how records are kept is mostly advisory, since each court is highly autonomous. Consequently, the record system varies widely from court to court. Federal records of the district and appeals courts are "deposited without restriction," according to the Documents Commission. If records are sealed, as with those of votes in grand jury indictments, the files can be opened only upon the order of that court.[13]

The public papers of federal district and appeals judges are considered traditionally to be the property of the judge. The papers typically include official correspondence, case memoranda, reports of law clerks and other non-record materials related to court functions. The commission reports that there are no consistent customs in the handling of these papers after a judge's tenure is ended. Since tenure is based on good behavior, judges often serve for life. It is not uncommon for the court clerk to box up a judge's papers posthumously and send them off to the family. Few of these collections end up in a library or archival institution; they usually stay in the family and are scattered or lost.[14]

The federal records of the Supreme Court include detailed minutes, dockets, opinions, tapes of oral arguments, appellate case files and original jurisdiction files. The originals of the case transcripts and briefs of counsel are kept in the Supreme Court Library. All other federal records are transferred to the National Archives at irregular intervals. Access is largely unrestricted, though there are limits on the use of some of the taped material. A major break from the practice of lower courts is in the custody of the high court's federal records. Even though they are deposited with the National Archives, they are still in the legal custody of the Supreme Court, which can presumably limit access to them.[15]

The Documents Commission describes two factors that highly color the handling of and access to the public papers of justices. The first is that the court is a court of record — the utterances of the justices are the law of the land. The second factor is the traditional secrecy in the way by which the high court reaches decisions. These two have led, on one hand, to a meticulous filing system of federal records. On the other, the working papers are either intentionally destroyed when a justice leaves office, or access to them is severely restricted.

The papers generally will contain docket books; conference notes and memoranda for each case argued, denied or dismissed; drafts of majority and dissenting opinions, often with margin notes from other justices; speech files; general correspondence; and research files on subjects of interest to the individual justice. The commission reports a trend in the 20th century for justices to preserve their papers, but there are still severe limits to access.[16]

The Battle for the Nixon Papers

The Nixon tapes are responsible for the current interest in the disposition of presidential papers, and by reflection all other federal officials' papers. Prior to Watergate, the respect for the executive office and the man in it precluded criticism of how the presidential documents were handled after the administration was ended. It was assumed that as long as the public entrusted enormous powers to one man, it could rest assured that the public papers involved in using those powers would receive fair care. The very purpose of the Nixon tapes was to have an accurate record of the events that transpired during the administration. Late in Nixon's presidency there were (Louisville Courier-Journal, 10-15-78) nine archivists working in the White House, preparing the documents for indexing and storage on an ongoing basis.

Nixon has been fighting in court the prospect of turning his tapes and records over to the government and laying them bare for public scrutiny ever since he first refused the initial subpoenas of the Watergate prosecutor and the Senate in August 1973. Now after six years, it seems that the papers may soon be available.

Nixon's reluctance, whether due to an unwillingness to reveal either incriminating information or personal and private details unrelated to his public life, will not be judged. He has certainly been proceeding in the tradition that a president's papers, like his mandate, are a public trust to be returned to the people in a manner entirely up to the former chief executive. Suffice it to say that the thought that a president was hoarding the fruits of his administration, unwilling to release them and perhaps contemplating their destruction started the wheels of public opinion turning.

When Nixon left office, he signed an agreement with the head of the General Services Administration, Arthur Sampson. The pact stated that Nixon would deed his papers and tapes to the government at a future date, under certain restrictions of access, and that the GSA would transport the documents to California for the former president's use, which included the right to destroy any tapes he wished after 1977. However, President Ford, at the request of the special Watergate prosecutor, had the papers impounded to hold them for use in the upcoming trials, and to prevent Nixon from possibly exercising his option to destroy the potential evidence.

In addition, Congress rushed through a bill directing Sampson to retain complete possession and control of all Nixon's tapes and documents and establish a system for access to the materials by the courts and eventually by the public. The bill, S 4016, allowed either house of Congress 90 days to veto the regulations the GSA might create to implement the bill's provisions. The one-house veto could thwart any political pressure on the GSA to avoid compliance with the letter and spirit of S 4061. The bill, intended as an emergency measure, purposely left the question of public ownership of presidential papers unanswered. A senator explained that addressing broad constitutional issues might

jeopardize the whole piece of legislation, if it were challenged in court. Instead, S 4061 called for the establishment of the Documents Commission to tackle such subjects.

In December 1974 Congress passed the 1974 Presidential Papers Preservation Act and Ford signed it.[17] Nixon meanwhile had brought suit in the fall of 1974 in a federal district court, asking for the fulfillment of his agreement with Sampson.

The District Court handed down (New York **Times**, 2-1-75) a ruling on January 31, 1975, which stated,

> The claim of ownership of former President Nixon to the 'Presidential materials and tape-recorded conversations' of the Nixon administration is contrary to the general principle of law that that which is generated or kept in the administration and performance of the powers and duties of a public office belongs to the Government.

Upon appeal a special three-judge court in January 1976 upheld the 1974 act — despite Congress' disclaimer of ownership of the papers — that the Nixon documents were public property. The court also agreed with the Justice Department that Nixon was an untrustworthy guardian of the materials. But access was again postponed until Nixon could appeal to the Supreme Court.[18]

Despite the former president's almost immediate appeal, the decision on whether to hear the case was postponed by the high court for 11 months.

Finally in June 1977 the high court upheld the special appeals court against Nixon's suit in a 7-2 decision. The majority opinion re-emphasized (New York **Times**, 6-29-77) the singularity of the case, noting that it arose in a "context unique in the history of the president."

Based on this decision, three suits were filed to gain access to the papers and tapes under FOIA provisions. The three plaintiffs were Jack Anderson, a group of scholars and journalists headed by the Reporters Committee for Freedom of the Press, and a group led by playwright Lillian Hellman.[19] They filed suit in District Court for access under FOIA, but the court ruled in September 1977, that the 1974 law providing access to the Nixon materials and the Supreme Court upholding the law in June 1977, "made moot" the FOIA request.[20]

The decision was appealed, and the higher court reversed the District Court's decision on December 21, 1978. The 1974 law, the court said, provides that "the provisions of this title shall not in any way affect the rights, limitations or exemptions applicable under the Freedom of Information Act." The court further found that[21]

> Our decision, which merely allows FOIA requests to proceed unhindered by the (1974) Materials Act, will not infringe Nixon's asserted constitutionally based privacy interests in some of the material now under government control. After this case returns to the District Court, he will be free to raise constitutional objections to screening or disclosure pursuant to any specific FOIA request.

Nixon did not pursue the FOIA issue for good reason. Although the June 1977 decision upheld the constitutionality of the 1974 Presidential Paers Preservation Act, it did give Nixon the option of challenging the GSA regulations when Congress approved them. "Nixon's lawyers have used that as a bargaining chip," according to the Washington **Post** (12-28-78), "offering to drop the claim . . . in return for the government's amending some of the access regulations the former president finds onerous."

The GSA had presented Congress with proposed regulations three times, and three times Congress had disapproved under the one-house veto provision in the 1974 law. The fourth set of proposed regulations was submitted in June 1977, and approved in December of that year.[22]

According to the regulations, the archivists in the National Archives' Nixon Historical Materials Project would begin identifying, organizing and indexing the millions of pages and hours of tapes. Work began in January 1978; the archivists separating the personal and private material from the public and official. They also must segregate material related to the Watergate incidents, to make it quickly available to the public. Material restricted for national security, foreign policy and similar reasons also will be identified and separated out.[23]

In later years, as the status of various documents or tapes changes, the archivists are required to review the restrictions and change them periodically. The initial processing is going slowly, although Congress has taken a direct interest in speeding it up. $400,000 was appropriated,(Los Angeles **Times**, 11-5-78) in 1978, and according to the project's acting director at that time, Richard Jacobs, the National Archives expects to receive $1.2 million each year to complete the job. Jacobs estimated (Los Angeles **Times**, 11-5-78) that it would take six years to finish. He also estimated that the first of the Nixon material would be available in mid-1979, "provided all the litigation is resolved by then."

But litigation has not been resolved because Nixon acted (Washington **Post**, 12-28-78) on his option to challenge the regulation, which he did in a suit in District Court in January 1978. Among his contentions was that the one-house veto Congress had carefully included in the 1974 bill was unconstitutional. In April, 1978, the Justice Department agreed (Columbia **Daily Tribune**, 4-16-78).

Nixon had so far been fighting and losing a series of decisions on public and court access to his papers. The only battle in which he seemed to have emerged victorious was the one involving network access to the Watergate trial tapes.

In this case, the Supreme Court ruled (New York **Times**, 4-19-78) that the trial judge (District Judge John Sirica, who had denied access to the trial tapes) retained discretion regarding access to court records and that earlier access decisions (referring to the 1974 Act) provided alternate means of access to the material.

The negotiations over the GSA regulations continued until late this summer when a compromise draft of GSA regulations was hammered out among lawyers for Nixon, the National Archives and the group led by the Reporters Committee. Most points of contention were settled out of court. Two were argued before District Court Judge Aubrey Robinson, and on July 23 he ruled (Kansas City **Times**, 7-25-79) in favor of the Reporters Committee group on both issues.

Judge Robinson declared that "diary tapes," which Nixon said were private, could be screened by archivists to extract public information.

The judge also said that the National Archives could proceed with a network of listening centers where the Watergate tapes could be played for the public. The dozen centers will be in Washington, D.C., Atlanta, Chicago, Philadelphia, Waltham (Mass.), Bayonne (N.J.), Kansas City, Fort Worth (Tex.), Denver, Seattle and San Bruno and Laguna Niguel (Ca.). An attorney for the National Archives estimated (Denver **Post**, 7-25-79) that the tapes could be available by 1983.

Roadblocks still remain before the new GSA access

regulations. Because of the 1974 law, the regulations must lie before Congress for 90 working days, subject to the one-house veto. Judge Robinson's order is also subject to appeal. Barring either of these two delays, the National Archives could have the new processing and access guidelines in force by March 1980.

The Documents Commission

The Final Report of the Study Commission on Records and Documents of Federal Officials, referred to throughout this report, was probably the highwater mark in proposals on access to public papers. Although its recommendations were largely ignored, the commission applied systematic inquiry to an area that had previously been the province of tradition, favoritism and whim. The commission was created by the 1974 law to[24]

> . . . study the problems and questions with respect to the control, disposition, and preservation of records and documents produced by or on behalf of Federal officials, with a view toward the development of appropriate legislative recommendations and other recommendations regarding appropriate rules and procedures with respect to such control, disposition and preservation.

"Federal officials" meant the president, vice president, agency officials, members of Congress, and the federal judiciary.

The 1974 law said that the 17 members should have a wide variety of backgrounds and interests. Four were to come from Congress — one from each party of each house. The president was to appoint a representative of his branch, and also three others with expertise in the area of archives or government documents. The departments of Defense, State and Justice and the GSA — parent organization of the National Archives — were to send members. The American Historical Association, Society of American Archives and Organization of American Historians were each to appoint a member to the commission. A representative of the field of journalism was not requested, although the commission was instructed to seek the advice and assistance of journalists and other professions.[25]

The commission began work in December 1975. It convened panels of journalists; congressional, judicial and White House historians; and experts on government agencies to look into the questions of federal papers from different viewpoints. It also interviewed members of the judiciary, agencies and workers in Congress and received a number of reports and surveys from interested organizations and paid consultants.[26]

As the commission worked, a basic difference grew among its members. Chairman Herbert Brownell, former attorney general under Eisenhower, favored (Washington **Star**, 4-1-77) more immediate access to public papers than most of the members did. Brownell couldn't sway the others, however, and the majority report was presented to President Carter and Congress in April 1977.

The commission recommendations complemented and extended the Presidential Libraries Act of 1955, allowing the president, vice president, senators, representatives and federal judges to designate a depository for their public papers. Specifically, the report issued the following recommendations.

The president's and vice president's personal papers, including much information on their political activity, should be the personal property of the officeholder. Public papers should be public property, but after leaving office, the president or vice president could restrict access to the papers for up to 15 years, after which, with the exception of materials that if disclosed would harm national security or constitute an invasion of privacy, the papers should be directly available to the public. All other materials made or received by the executive office of the president should be federal records subject to the access provisions of FOIA.[27]

Agencies' federal records, already under FOIA, should be restricted for no more than 30 years, instead of the 50-year ceiling.[28]

All institutional records of Congress should be federal records subject to FOIA access and the Privacy Act. Members' public papers were also to be public property, but under similar restrictions as the presidential papers. After 15 years there should be general access, with exemptions for material that if released would invade privacy, particularly the privacy of constituents.[29]

All institutional records of the judiciary should be federal records and also come under the provisions of FOIA. Public papers of justices and judges should be public property, subject to restrictions imposed by the former officeholder for up to 15 years, after which there should be general access. Exemptions after the 15 years would be granted only to material that if released would invade privacy or impair ongoing litigation.[30]

The minority also was able to file a report, signed by Brownell and Sen. Lowell Weicker, the only other member to support him. Though Weicker and Brownell agreed with the majority that public papers should be public property, the similarities ended there. The minority report held that no distinction be drawn between public papers and federal records, and that both groupings should be made available to the public under modified FOIA provisions as soon as the incumbent left office.[31] The minority was generally more concerned with a right to know and less with any chilling effect immediate access might have on the creation of records.

In contrast, the majority report questioned the applicability of FOIA to the other branches of government. FOIA's access and exemption provisions were "tailored to fit agency needs and problems," the majority report said. The commission felt that the act could not generally be "lifted out of context and imposed on the public papers of the president, the Congress and the judiciary, which involve interests not considered in its formulation." The majority report expressed great concern for the "free flow of information and advice" in federal officials' decision making[32]

The Presidential Records Act of 1978

When Congress began work on the commission's recommendations it tended toward the aspects of each report that most strongly reflected withholding the papers. The final bill that emerged took the suggestion from the minority report that FOIA access provisions be applied to public papers of the president and vice president, and modified the suggestion from the majority report on a restriction period by allowing the former officeholder to withhold papers for up to 12 years.

After the excesses of Watergate and the court battles following, Congress was more than willing to limit presidential control over the public papers and increase access to them. But there was little enthusiasm to extend the legislation to other branches, despite admonitions from Philip Buchen, Ford's former White House counsel, that, "Congress should do unto the President only what it would be

willing to do unto itself.[33]

Two House Democrats drafted legislation that would increase access to the House's institutional documents. Rep. Allen Ertel, who served as a member of the Documents Commission, and Rep. John Brademas proposed the bill. Even Ertel realized that there would be extensive compromise to get any access legislation through at all. **Congressional Quarterly** said that[34]

> In order to try to win support in Congress, which has frequently exempted itself from laws it enacts governing other federal officials, "We're trying to put it in the most palatable way we can," said Ertel.

The number of parties interested in the legislation and their separate concerns proved to be too much for conprehensive access legislation affecting public papers of the three branches of government. The bill that emerged from Congress on Oct. 14, 1978, and signed by President Carter on Nov. 4 was a far cry from the optimistic recommendations of the Documents Commission.

The law declared that "The United States shall reserve and retain complete ownership, possession, and control of Presidential records . . .," clearing up the ownership question for the executive branch for the first time, but not for the others. The law bypasses the distinction of federal records and public papers, and instead applies equally to all "documentary materials . . . created or received by the president, his immediate staff or . . . the Executive Office of the president" in the course of carrying out his official duties. According to the bill, the president will consult with an archivist throughout his term on the proper method of handling and preserving records. He will notify Congress before destroying any files. At the end of his last term the National Archives will assume control of all but personal papers.[35]

The president then may restrict for up to 12 years any records that concern secrets about national defense, foreign policy, or if they concern presidential appointments, trade secrets or confidential advice to the president. Other restrictions that could apply are personnel or medical files that would constitute an invasion of privacy and any records that are exempt from access requirements by any other specific statute. Papers that the president does not restrict become available to the public under FOIA as soon as the archives can process them. The president's decisions regarding restrictions could be appealed by individuals to the archivist in charge of the papers. Access would be granted, despite the restrictions, if the records were needed for civil or criminal proceedings, needed by an incumbent president or Congress and if there were no other way to get the desired information, or lastly, to the former president or his representative.[36]

After the 12-year limit all papers in the collection that are not already open to access under FOIA become so. An important addition to the bill is that the exemption from access in the FOIA dealing with intra- and interagency memoranda and letters will not apply to unrestricted presidential papers. Thus, some of the predecision hows and whys of official action will perhaps come to light.[37]

It remains to be seen, of course, how the new law will be implemented when it goes into effect in January 1981, the beginning of the next presidential term. As far as access to public papers goes, the sound and the fury of Watergate is receding. The Nixon papers will apparently be available, in some form, soon. President Carter has been careful to deed (Des Moines **Register**, 3-1-78) his papers to the government after his 1976-1980 term, complying with the spirit of the future regulations. He will be the last president to do so. Now that all past chief executives are settling the ownership and access questions to their records, and future presidents have clear laws to obey in this area, the public clamor for the records will lessen. It remains to be seen whether there will also be a lessening of public resolve to follow through on the 1978 law and push for further access in other areas.

FOOTNOTES

1. National Study Commission on Records and Documents of Federal Officials, **Final Report** (Washington, D.C.: U.S. Government Printing Office, March 31, 1977) pp. 6, 29.
2. **Ibid.**, p. 1.
3. Arthur Schlesinger, Jr., "The Secrecy Dilemma," **New York Times Magazine**, Feb. 6, 1972, pp. 12ff.
4. **Ibid.**, p. 12ff.
5. Don McLeod, "Presidential Papers: Who Owns Them?" **Star and Stripes**, Feb. 25, 1974.
6. **Ibid.**
7. Documents Commission, p. 17.
8. **Ibid.**, pp. 18-19.
9. **United States Law Week**, Vol. 46, No. 4, Dec. 20, 1977, pp. 2315-2316 (Reporters Committee for Freedom of the Press v. Vance).
10. **Ibid.**, p. 2316.
11. Reporters Committee v. Vance, **Media Law Reporter**, (Washington, D.C.: Bureau of National Affairs, Inc., 1978) p. 1525.
12. Documents Commission, pp. 19-21.
13. **Ibid.**, pp. 22-23.
14. **Ibid.**, pp. 25.
15. **Ibid.**, pp. 25-26.
17. Congressional Quarterly, Inc., **1974 Congressional Alamanac** (Washington, D.C.: Congressional Quarterly, Inc., 1975) p. 654.
18. "Nixon Tapes and Documents Roundup: Congress, Ford, Appeals Court, Actions," **Press Censorship Newsletter**, April-May, 1975, p. 41.
19. **Ibid.**, p. 41.
20. Nixon v. Sampson, 3 **Media Law Reporter**, (Washington, D.C.: Bureau of National Affairs, Inc., 1978) p. 1658.
21. Reporters Committee v. Sampson, 4 **Media Law Reporter**, (Washington, D.C.: Bureau of National Affairs, Inc., 1979) p. 1866.
22. U.S. General Services Administration, "Preservation of Access to the Presidential Historical Material of the Nixon Administration," **Federal Register**, Dec. 16, 1977, pp. 63626-63629.
23. **Ibid.**
24. U.S. Congress, House, **Presidential Recordings and Materials Preservation Act**, Pub. L. 93-526, 88 1695, 93rd Congress, 2nd session, S 4016, p. 11206.
25. **Ibid.**, p. 11206.
26. Documents Commission, pp. 11-12.
27. **Ibid.**, p. 29-32.
28. **Ibid.**, pp. 32-33.
29. **Ibid.**, pp. 34-37.
30. **Ibid.**, pp. 37-42.
31. **Ibid.**, pp. 105-112.
32. **Ibid.**, p. 8.
33. Ann Cooper, "House Getting Pressure for More Public Access To Its Official Papers," **Congressional Quarterly Weekly Report**, March 4, 1978, pp. 577-578.
34. **Ibid.**, p. 577.
35. U.S. Congress, House, **Presidential Records Act of 1978**, 95th Congress, 2nd session, HR 13500, p. 3.
36. **Ibid.**, p. 12.
37. **Ibid.**, p. 7.

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